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In The Supreme Court of the United States

JERRY HART; ANDRE DYER,

Petitioners,

v.

CITY OF LITTLE ROCK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTIONS PRESENTED FOR REVIEW

I. Can the "state created danger" theory be asserted as a viable basis for municipal civil liability under 42 U.S.C. § 1983 consistent with this Court's holding in DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189, 109 S. Ct. 998 (1989)?

II. If the foregoing question is answered in the affirmative, which of the multiple federal circuit courts' different frameworks constitutes the proper standard for determining whether "deliberate indifference" has been demonstrated in a § 1983 case premised on the "state created danger" theory?

PARTIES TO THE PROCEEDINGS

Petitioners are Officer Jerry Hart and Officer Andre Dyer, both City of Little Rock, Arkansas police officers at all times relevant to this case.

Respondent is the City of Little Rock, Arkansas.

CORPORATE DISCLOSURE STATEMENT

Neither Petitioners nor Respondent are publicly held corporations.

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INTRODUCTION

Petitioners, Officers Jerry Hart and Andre Dyer ("Hart and Dyer"), respectfully petition for a writ of certiorari to review the Judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS DELIVERED BELOW

The Opinion of the Eighth Circuit Court of Appeals is reported at Hart v. City of Little Rock, 432 F.3d 801 (8th Cir. 2006), and is reproduced at App.[1] 1a-15a. The Amended And Substituted Order of the District Court denying the City of Little Rock's motion for judgment as a matter of law is unreported but is reproduced at App. 18a-33a. The Eighth Circuit's Order denying Hart & Dyer's Petition For Rehearing By Panel And For Rehearing *En Banc* is also unreported but is reproduced at App. 36a.

GROUNDS UPON WHICH JURISDICTION IS INVOKED

The Eighth Circuit's Judgment was entered on December 22, 2005. A timely Petition For Rehearing By Panel And For Rehearing *En Banc* was denied on February 9, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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[1] References made throughout this Petition to "App." are to the Appendix.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

As set forth in detail below, the Eighth Circuit Court of Appeals held that the evidence was insufficient to support the jury's verdict finding the City of Little Rock liable for violations of Petitioners' substantive due process rights under 42 U.S.C. § 1983 and the "state created danger" theory of liability. In doing so however, the Eighth Circuit's decision was premised upon an announced standard that departs from that used by multiple federal circuit courts. Petitioners contend that the instant case presents an opportunity for this Court to, for apparently the first time, opine on the very existence or nonexistence of the "state created danger" theory of § 1983 liability, as well as the appropriate intent standard utilized under such theory. The pertinent facts underlying this case are as follows.

A. The District Court Proceeding

This petition ultimately arises out of a civil rights action brought by Hart and Dyer against the City of Little Rock, Arkansas under 42 U.S.C. § 1983 alleging substantive due process violations. App. 20a; 2a. A jury awarded each officer $225,000 and the District Court denied Little Rock's motions for judgment as a matter of law and a new trial. App. 2a. The Eighth Circuit reversed as described below. App. 20a.

Specifically, Hart and Dyer were police officers employed by Little Rock and on May 30, 2001, they arrested Michael Bullock on drug charges. App. 2a. Bullock, who had three other

felony convictions, had previously been arrested by Hart and Dyer and had filed complaints against them. App. 19a; 2a. Petitioners contend that Bullock had a grudge against them because he was convicted and incarcerated as a result of these arrests, had filed complaints against them with the police department, and because a neighbor and associate of Bullock's had placed a contract on their lives. App. 19a.

During the criminal proceedings against Bullock, his lawyer, at Bullock's behest, subpoenaed Hart's and Dyer's city personnel files. App. 19a. The subpoena was received by Stacey Witherell, an employee in Little Rock's Human Resources Department. App. 19a. It directed Little Rock to produce the files at trial, but a cover sheet indicated the City could comply by providing copies ahead of trial. App. 19a. Witherell, in accordance with Little Rock's practice, made unredacted copies of the complete files and gave them to the lawyer on the same day that the subpoena was received. App. 19a.

Bullock eventually pleaded guilty but not before his legal counsel gave him copies of the files containing "very sensitive" personal information about Hart and Dyer, including home addresses, Social Security numbers, names and addresses of family members, driver's license numbers, and other personal information. App. 24a; 26a; 19a; 3a. While incarcerated awaiting trial, Bullock told other inmates and a sheriff's deputy that he had the files and suggested that the information could be used to cause problems for Hart and Dyer. App. 28a; 3a. See also App. 38a (excerpt from trial transcript

wherein a witness guarding Bullock testified that "he stacked all his papers up and he indicated to me—he made the statement: 'Do you know what I can do with this type of information on these officers?' And he stated that he did have a personal vendetta against these two officers."). After Bullock talked to the deputy, the copies were seized and destroyed. App. 3a.

Hart and Dyer sued Little Rock alleging the disclosure of the personnel files violated their substantive due process rights. App. 20a; 3a. Specifically, they alleged that the disclosure violated their privacy rights, implicating their fundamental interests in preserving personal security and bodily integrity. App. 20a; 3a. Little Rock's motion for summary judgment was denied and the case proceeded to trial. App. 20a; 3a. At trial, Hart and Dyer argued that Little Rock's practice of releasing employee personnel files without redaction or notice to the employees demonstrated deliberate indifference to their privacy rights. App. 24a-25a; 4a. As police officers, they contended that the release of information was especially egregious because it placed them in grave danger from criminals who might retaliate against them or family members. App. 25a; 3a.

Both Hart and Dyer testified that the disclosure of their personnel files caused them much fear and anxiety. App. 27a-28a; 3a-4a. For instance, Hart testified that he felt financial and emotional repercussions, that he moved out of his apartment, lost weight, became impatient, worried about his personal safety and his family's safety, was unable to

continue his visitation schedule with his daughter our of fear for her safety, and missed work and was adversely affected at work because he felt betrayed by the City. App. 27a-28a; 3a-4a. Dyer testified that he also suffered financial and emotional effects, worried constantly about his and his family's safety, changed his routines, and took additional safety measures, such as buying additional firearms and a guard dog, teaching his wife to shoot a rifle, and reinforcing the doors to his home. App. 28a; 3a-4a. Other witnesses testified that he became short-tempered, paranoid, appeared stressed, and that his personal relationships suffered. App. 28a; 4a.

The jury heard evidence of an incident where Hart and Dyer were shot at during an unrelated drug arrest. App. 4a. Indeed, Petitioners were assigned to patrol one of the most dangerous areas of the City. App. 18a. The incident did not involve Bullock but demonstrated the dangerousness of their jobs and that their safety concerns were well founded. App. 4a. Additionally, Petitioners presented evidence that Shawn Jimenez, an acquaintance of Bullock's, once attempted to hire an undercover police officer and confidential informant to kill them. App. 28a; 4a. Jiminez was actually found guilty of two counts of solicitation of capital murder resulting from this incident. App. 28a. There was also evidence presented that Bullock was a "bully" and generally considered a violent person. App. 28a.

The jury concluded that Little Rock's above-described release of the personnel files was a violation of the officers' substantive due process

rights and awarded each $225,000. App. 20a; 4a. See also App. 34a-35a. In post-trial motions, the District Court denied Little Rock's motions for judgment as a matter of law and a new trial, and granted Hart and Dyer's motions for costs and attorneys' fees. App. 4a.

B. The Eighth Circuit Court Of Appeals Proceeding

On appeal, Little Rock contended that the District Court erred in denying its motion for judgment as a matter of law because the evidence was insufficient to support the substantive due process claims. App. 4a. Little Rock also contended that the District Court should have granted its new trial motion because the evidence relating to the shootout and Jimenez was improperly admitted. App. 4a. Finally, Little Rock contended that the damages awards were unsupported by the evidence, requiring either a new trial or remittitur. App. 4a-5a. On appeal, the Eighth Circuit agreed with Little Rock that the District Court erred in denying Little Rock's motion for judgment as a matter of law because the evidence was purportedly insufficient to prove that it violated Hart's and Dyer's substantive due process rights under § 1983. App. 5a.

Specifically, the panel decision noted that while it was troubled by the City's practice of releasing police officer's personnel files without notice or any attempt to redact sensitive personal information, that the evidence demonstrated the City's actions amounted to negligence or gross negligence and did not rise to the level of subjective

"deliberate indifference" necessary to sustain a substantive due process claim. App. 13a-14a. In doing so the panel explicitly rejected the reasoning and standard expressed in a remarkably similar Sixth Circuit case upon which Hart and Dyer relied in this matter, notwithstanding that it involved virtually the same pertinent facts and liability. App. 14a. In Kallstrom v. City of Columbus, 136 F.3d 1055 (6th Cir. 1998), three police officers sued the City of Columbus because it released their personnel files to the attorney representing members of a violent gang. During the defendants' criminal trials, it was disclosed that the information in the files had been disseminated to them. Id. at 1059. The officers sued, and on appeal from a grant of summary judgment the Kallstrom court held that the City's practice of releasing police officer's personnel files under such circumstances created a "constitutionally cognizable 'special danger,' giving rise to liability under § 1983." Id. at 1067.[2] The Sixth Circuit held that "[t]he City either knew or clearly should have known" that releasing the officers' personal information substantially increased their "vulnerability to private acts of vengeance." Id.

However, the panel in the present case concluded that "[t]he Kallstrom court erroneously applied a negligence standard instead of the subjective deliberate indifference standard' adopted in Farmer v. Brennan, 511 U.S. 825, 837, 114 S. Ct. 1970, 1979 (1994). It then stated that because the District Court in Petitioners' case relied upon

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[2] The District Court in the present case denied the City of Little Rock's Motion For Judgment As A Matter Of Law on the basis of Kallstrom. App. 14a.

Kallstrom, it also effectively adopted a negligence standard, making the denial of Little Rock's motion for judgment as a matter of law "erroneous." App. 14a-15a. In accordance with the Eighth Circuit's decision, upon remand the Eighth Circuit granted Little Rock's motion for judgment as a matter of law and entered judgment in favor of Little Rock. App. 16a; 17a. For the reasons stated below, certiorari should be granted to address the substantial questions of law raised in this case, but currently in dispute among the federal circuit courts, and in doing so the Eighth Circuit's decision should be reversed.

REASONS FOR GRANTING THE PETITION

A. The Intercircuit Conflict As To The Very Existence Of The "State Created Danger" Theory Of § 1983 Liability

Ever since this Court held in DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 197, 109 S. Ct. 998, 1004 (1989) that "[a]s a general matter, . . . a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process clause[,]" lower courts have attempted to decide when and under what circumstances a more limited right to this protection may exist. See generally Karen M. Blum, DeShaney: Custody, Creation of Danger, And Culpability, 27 Loy. L.A. L. Rev. 435 (1994). However, most circuits appear to have recognized that such a right may exist under this theory when the evidence demonstrates that the State actor's

affirmative acts create or increase the danger that results in the plaintiff's injury. See, *e.g.*, Velez-Diaz v. Vega-Irizarry, 421 F.3d 71, 80 (1st Cir. 2005); Dwares v. City of New York, 985 F.2d 94, 98-100 (2d Cir. 1993); Kneipp v. Tedder, 95 F.3d 1199, 1208 (3rd Cir. 1996); Pinder v. Johnson, 54 F.3d 1169, 1175-76 (4th Cir. 1995) (*en banc*); Kallstrom v. City of Columbus, 136 F.3d 1055, 1066 (6th Cir. 1998); Reed v. Gardner, 986 F.2d 1122, 1126 (7th Cir. 1993); Freeman v. Ferguson, 911 F.2d 52, 55 (8th Cir. 1992); L.W. v. Grubbs, 974 F.2d 119, 121-22 (9th Cir. 1990); Uhlrig v. Harder, 64 F.3d 567, 572 (10th Cir. 1995); Cornelius v. Town of Highland Lake, 880 F.2d 348, 354 (11th Cir. 1989), *overruled on other grounds by* White v. Lemacks, 183 F.3d 1253, 1259 (11th Cir. 1999); Butera v. District of Columbia, 235 F.3d 637, 651 (D.C. Cir. 2001).

However, the Fifth Circuit has "flatly rejected" the state created danger theory. See Rivera v. Rhode Island, 402 F.3d 27, 35 (1st Cir. 2005) (*citing* Beltran v. City of El Paso, 367 F.3d 299, 307 (5th Cir. 2004)). For example, in McClendon v. City of Columbia, 305 F.3d 314 (5th Cir. 2002) (*en banc*), the Fifth Circuit declined to recognize a constitutional cause of action as these other circuits did under what is now known as the "state created danger" theory, and the Fifth Circuit's consistent refusal to recognize such theory since has resulted in a clear and irreconcilable conflict among the circuits with respect to the uncertain scope of this doctrine. See Beltran, *supra*. Indeed, the dissenting judge in McClendon observed that the majority opinion "clearly reflects a court that aspires to be the only circuit in the country to reject the state-created

danger theory but cannot bring itself to admit it." Id. at 334 (Parker, J., dissenting); see also Id. at 338 n. 10 ("In refusing to make this decision, the majority attempts to create the illusion that no Circuit split exists in hopes of avoiding Supreme Court scrutiny."). Accordingly, as the Fifth Circuit has not since strayed from such position, a conflict endures as to the doctrine's very existence and the instant case would allow this Court to opine once and for all as to the viability of this theory as a matter of federal law.

B. The Intercircuit Conflict Regarding The Intent Element Of The "State Created Danger" Theory Of § 1983 Liability

Of course, this case also squarely presents the unresolved question as to the requisite state of mind necessary to establish § 1983 liability under the state created danger theory. As described below, an even more stark conflict exists among the circuits that already do recognize the existence of the state created danger theory as to this issue.

Specifically, following DeShaney many courts interpreted that opinion as expressly affording a state created danger theory of liability under § 1983, but these courts have still not been able to agree as to how that theory will be applied in practice, especially with respect to the theory's intent element. Courts applying the "state created danger" exception to the DeShaney rule have generally agreed that plaintiffs must demonstrate that the defendant-state official at a minimum act with

"deliberate indifference" toward the plaintiff. See, *e.g.*, Butera v. District of Columbia, 235 F.3d 637, 652 (D.C. Cir. 2001); Huffman v. County of Los Angeles, 147 F.3d 1054, 1059 (9th Cir. 1998). "[D]eliberate indifference is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his actions." Bryan v. Brown, 520 U.S. 397, 410, 117 S. Ct. 1382, 1391 (1997). In order to prove deliberate indifference, a plaintiff must prove that the state actor knew of and disregarded an excessive risk to the victim's health or safety. Farmer v. Brennan, 511 U.S. 825, 837, 114 S. Ct. 1970, 1979 (1994).

Whether conduct constitutes deliberate indifference is a subjective rather than an objective determination, Id., and thus "it remains open to the officials to prove that they were unaware of even an obvious risk to . . . health or safety. That a trier of fact may infer knowledge from the obvious, in other words, does not mean that it must do so." Hott v. Hennepin County, Minnesota, 260 F.3d 901, 907 (8th Cir. 2001). Deliberate indifference has been equated with subjective recklessness, and requires that the § 1983 plaintiff show that the state official knows of and disregards an excessive risk to the victim's health or safety. Farmer, 511 U.S. at 838-39, 114 S. Ct. at 1979-80; see also Ewolski v. City of Brunswick, 287 F.3d 492, 513 (6th Cir. 2002). Under this definition "the official must be both aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Farmer, 511 U.S. at 837, 114 S. Ct. at 1979. Once the state actor draws the necessary inference, "the official must act or fail to

act in a manner demonstrating recklessness or callous indifference toward the individual's rights." Ewolski, 287 F. 3d at 513.

However, there is a clear split in the circuits as to how this general "deliberate indifference" standard may be satisfied in state created danger cases. For instance, under Kallstrom (which the District Court in this case cited), Petitioners only needed to demonstrate that the City of Little Rock *knew or should have known* that providing Petitioners' personnel information (without reviewing or redacting it) to a criminal defense attorney specifically endangered Petitioners or their families. See Kallstrom, 136 F.3d at 1066; see also Jones v. Reynolds, 438 F.3d 685, 690 (6th Cir. 2006) ("to bring a 'state created danger' claim, the individual must show: . . . [that] the state knew or should have known that its actions specifically endangered the plaintiff.") (*citing* Cartwright v. City of Marine City, 336 F.3d 487, 493 (6th Cir. 2003) and Kallstrom, 136 F.3d at 1066)).[3]

However, in the present case the Eighth Circuit rejected the Sixth Circuit's well-established (and post-Farmer) "knew or should have known"

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[3] Incidentally, even the Eighth Circuit (which rejected Kallstrom in this case) had once held to this effect. See Gregory v. City of Rogers, 974 F.2d 1006, 1010 (8th Cir. 1992) (*en banc*) (wherein the Eighth Circuit majority ruled in a state created danger case that a "knew or should have known" standard applied) (cited with approval by Reed v. Gardner, 986 F.2d 1122, 1126 (1993)) ("like the Eighth Circuit, we would require from a plaintiff sufficient evidence from which a jury could reasonably draw the inference that police officers knew or should have known" that the plaintiffs were in danger).

standard and held that the Sixth Circuit (and therefore the District Court, which relied upon Kallstrom) erroneously applied a negligence standard. App. 14a. The Eighth Circuit's holding in the present case is substantially more strict, and appears to constitute a virtually-impossible to satisfy "actual knowledge" test requiring not only the creation and disregard of a significant risk, but also conscious disregard of the very risks articulated by Hart and Dyer. App. 11a.

Still, other courts follow a third approach to satisfying the deliberate indifference test in the state created danger context when they hold that to prevail on such a § 1983 claim, the plaintiffs must not only prove their injuries but must also prove that "the state actors *knew of or suspected* the specific risk facing the plaintiffs and consciously ignored it or failed to stop it once discovered." J.H. & J.D. Higgin v. Johnson, 346 F.3d 788, 792 (7th Cir. 2003) (emphasis added). This is what the Seventh Circuit called a "modified" deliberate indifference standard (i.e., requiring actual knowledge *or suspicion* of the alleged risk of harm), and has been held to be consistent with this Court's precedent. Id. at 792 (emphasis in the original). In fact, the Seventh Circuit cited Farmer when outlining this standard and specifically reconciled the standards, stating that deliberate indifference can be satisfied "by proof of a state actor's knowledge or suspicion of the risk of harm, rather than just knowledge. *Both standards are subjective*." Id.

There is apparently even a fourth test with respect to establishing deliberate indifference in

state created danger cases. For example, in State of Smith v. Marasco, 318 F.3d 497, 509 (3rd Cir. 2003) (emphasis added), the Third Circuit held that "based on our reading of the precedents in this elusive area of the law that, except in those cases involving either true split-second decisions or, on the other end of the spectrum, those in which officials have the luxury of relaxed deliberation, an official's conduct may create state created danger liability because it exhibits *a level of gross negligence* or arbitrariness that shocks the conscious." If this is true, and evidence establishing gross negligence can be deemed to satisfy the requisite deliberate indifference standard in these cases, then the entire area of jurisprudence governing the intent element of the state created danger theory claim is plainly in a state of flux and cries out to be remedied by this Court. Compare, *e.g.*, Davis v. Fulton County, Arkansas, 90 F.3d 1346, 1352 (8th Cir. 1996) ("Negligent, or even grossly negligent, conduct by government officials cannot be the basis of a constitutional tort claim.").

C. These Conflicts Can Be Squarely Addressed In The Present Case, And Should Be Resolved In The Present Case

Given (1) questions over the very existence of the state created danger theory, and (2) the starkly different circuit approaches to the intent element of the state created danger theory, it is clear that similarly situated plaintiffs will continue to be either entitled to, or foreclosed from, relief for their injuries depending upon which jurisdiction in which their case arises. These conflicts have been in existence

for many years. See McClendon, 305 F.3d at 331 (rejecting the theory altogether, and observing that courts sanctioning the state created danger theory generally agreed "about the existence of a substantive due process right to be free from state-created danger. However, these courts were not in agreement as to the specific nature of that right. For example, these courts apparently disagreed as to the appropriate mental state required to hold a state actor liable for harms inflicted by third parties.") (citing cases).

Hart and Dyer therefore submit that this is one of those rare instances which squarely qualifies for an order granting their petition for writ of certiorari. See S. Ct. R. 10(a) (addressing this Court's jurisdiction with respect to federal circuit court conflicts). As the Advisory Committee to FED. R. APP. P. 35 has stated:

> [i]ntercircuit conflicts create problems. When the circuits construe the same federal law differently, the parties' rights and duties depend upon where a case is litigated. Given the increase in the number of cases decided by the federal courts and the limitations on the number of cases the Supreme Court can hear, conflicts between the circuits may remain unresolved by the Supreme Court for an extended period of time. The existence of an intercircuit conflict often creates additional litigation in the other circuits as well in the circuits that are already in conflict.

See FED. R. APP. P. 35, 1998 Advisory Committee Notes. One of the prime purposes of this Court's certiorari jurisdiction is to bring about uniformity of decisions on matters among the federal courts of appeal. See, *e.g.*, Marks v. United States, 430 U.S. 188, 189, 97 S. Ct. 990, 991 (1977) (certiorari granted "to resolve a conflict in the circuits"). Moreover, the importance and recurring nature of the issues presently in conflict warrant a grant of this Court's certiorari jurisdiction. See, *e.g.*, Aldinger v. Howard, 427 U.S. 1, 3, 96 S. Ct. 2413, 2415 (1976) (certiorari granted "to resolve the conflict on this important question"); Fuller v. Oregon, 417 U.S. 40, 42, 94 S. Ct. 2116, 2119 (1974) (certiorari granted "because of the importance of the question presented and the conflict of opinion on the constitutional issue involved"); Lehman v. Lycoming County Childrens' Services, 458 U.S. 502, 507, 102 S. Ct. 3231, 3235 (1982) (certiorari granted because "this is a question of importance not heretofore considered by this Court, and one over which the circuits are divided").

D. Petitioners Presented Sufficient Evidence Demonstrating Little Rock's Deliberate Indifference Toward Petitioners' Constitutional Rights

As will be argued much more extensively in the briefs on the merits (if this Court grants Petitioners' request for certiorari jurisdiction), Petitioners satisfied their burden of proof on the intent element with respect to all of the foregoing methods in which the various circuit courts have

held that a showing of "deliberate indifference" may be made. Specifically, Ms. Witherell testified at trial that the files which she provided to Bullock's attorney contained very sensitive data and highly personal information. App. 24a. She stated that she would be concerned if her own family members' names and addresses were acquired by a known felon. App. 24a. From her testimony it was clear that she did not consider the employees' position or their safety, as a rule, when producing documents pursuant to subpoenas and that she did not consider the Petitioners' safety in this instance. App. 24a. She testified, however, that she was aware at the time of production that the employees whose records were being requested were police officers, that the records were being requested by a criminal defense attorney for use in a criminal case, and that likely these officers had something to do with that case. App. 24a.

She also testified that she was following City policy by turning over Petitioners' personnel records. App. 24a. She further testified that the City's policy concerning production of personnel records was no different for police officers than other City employees even though she agreed that police officers had a greater privacy interest to protect than most government employees. App. 24a. She further stated that although the subpoena requested that the records be produced at trial, that it was the City's custom to provide the records prior to trial if an attorney requested them early. App. 24a.

With the foregoing in mind, the jury was instructed as follows:

> Plaintiffs must also demonstrate that through its deliberate conduct, the City of Little Rock was the moving force behind the injuries alleged by the Plaintiffs Jerry Hart and Andre Dyer. A merely negligent or even grossly negligent action is not sufficient to prove a constitutional violation.

App. 25a (*citing* Jury Instruction No. 8). The City did not object to this instruction. App. 25a. Applying this instruction to Ms. Witherell's testimony and all of the other testimony at trial, the jury found that City was deliberately indifferent to the Plaintiffs' right to privacy. App. 25a. The fact that the City had a policy to disregard the consequences of releasing its police officers' personnel information, and the fact that the City had a custom of disregarding the directive of the subpoena, presented sufficient evidence for the jury to make a finding of deliberate indifference. App. 25a.

It is therefore obvious that Witherell, i.e., Little Rock, created and consciously disregarded the risks articulated, therefore satisfying the Eighth Circuit's standard pronounced in this case. Such showing demonstrates that Little Rock's conduct also demonstrated "deliberate indifference" under the "knew or should have known" standard set forth by the Sixth Circuit in Kallstrom. It further satisfies the modified deliberate indifference standard set forth by the Seventh Circuit in J.H. & J.D. Higgin, which requires actual knowledge or mere suspicion of the alleged risk. Finally, it plainly satisfies the

Third Circuit's standard in State of Smith requiring only gross negligence.

CONCLUSION

To the Petitioners' knowledge this Court has yet to rule on the existence of the state created danger doctrine in general, and the circuit courts have yet to construct a unified approach as to the intent element of this theory in particular. For these reasons, Hart and Dyer respectfully request that their petition for writ of certiorari be granted, and that upon exercise of this Court's jurisdiction the Eighth Circuit Court of Appeal's Judgment dated December 22, 2005 be withdrawn, and that the Court enter a new Judgment consistent with the jury verdict in the District Court that was entered in favor of Hart and Dyer.

Respectfully submitted,

/s/

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

[ENTERED: DECEMBER 22, 2005]

No. 04-2714

Jerry Hart; Andre Dyer, *

*

Plaintiffs/Appellees, *

*

v. *

*

City of Little Rock, *

*

Defendant/Appellant. *

*

*

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*

Arkansas State Lodge Fraternal Order * of Police, *

*

Amicus on behalf of *
Appellee. *

Appeal from the United States
District Court for the Eastern
District of Arkansas

Submitted: October 10, 2005
Filed: December 22, 2005

Before BYE, BEAM, and SMITH, Circuit Judges.

BYE, Circuit Judge.

Police officers Jerry Hart and Andre Dyer successfully sued the City of Little Rock, Arkansas (Little Rock or the City) under 42 U.S.C. § 1983 alleging substantive due process violations. A jury awarded each officer $225,000, and the district court denied Little Rock's motions for judgment as a matter of law (JAML) and a new trial. We reverse.

I

Hart and Dyer are police officers employed by Little Rock. On May 30, 2001, they arrested Michael Bullock on drug charges. Bullock, who has three other felony convictions, had previously been arrested by Hart and Dyer and had filed complaints against them. In the course of the criminal proceedings against Bullock, his lawyer, at Bullock's behest, subpoenaed Hart's and Dyer's city personnel files. The subpoena was received by Stacey Witherell, an employee in Little Rock's human resources department. It directed Little Rock to produce the files at trial, but a cover-sheet indicated the City could comply by providing copies ahead of trial. Witherell, in accordance with Little Rock's practice, made copies of the complete files and gave them to the lawyer on the same day the subpoena was received.

Bullock eventually pleaded guilty but not before his legal counsel gave him copies of the files containing personal information about Hart and Dyer, including home addresses, social security numbers, names and addresses of family members, driver's license numbers, etc. While incarcerated awaiting trial, Bullock told other inmates and a sheriff's deputy he had the files and suggested the information could be used to cause problems for Hart and Dyer. After Bullock talked to the deputy, the copies were seized and destroyed.

Hart and Dyer sued Little Rock alleging the disclosure of the personnel files violated their substantive due process rights. Specifically, they alleged the disclosure violated their privacy rights, implicating their fundamental interests in preserving personal security and bodily integrity. Little Rock's motion for summary judgment was denied and the case proceeded to trial. At trial, Hart and Dyer argued Little Rock's practice of releasing employee personnel files without redaction or notice to the employees demonstrated deliberate indifference to their privacy rights. As police officers, they contended the release of information was especially egregious because it placed them in grave danger from criminals who might retaliate against them or family members. Both Hart and Dyer testified the disclosure of their personnel files caused them much fear and anxiety. Hart testified he moved out of his apartment, lost weight, became impatient, worried about his personal safety and his family's safety, and missed work because he felt betrayed by the City. Dyer testified he also worried constantly about his and his family's safety, changed his

routine, took additional safety measures, e.g., taught his wife to shoot a rifle, bought additional weapons, and reinforced the doors to his home. Other witnesses testified he became short-tempered, paranoid and appeared stressed.

Over Little Rock's objection, the district court also allowed evidence of an incident where Hart and Dyer were shot at during an unrelated drug arrest. The incident did not involve Bullock but was apparently admitted to illustrate the dangerousness of their jobs and to show their safety concerns were well-founded. Additionally, the district court allowed Hart and Dyer to present evidence that Shawn Jimenez, an acquaintance of Bullock's, once attempted to hire an undercover police officer to kill them.[1]

The jury concluded Little Rock's release of the personnel files was a violation of the officers' substantive due process rights and awarded each $225,000. In posttrial motions, the district court denied Little Rock's motions for JAML and a new trial, and granted Hart's and Dyer's motions for costs and attorney's fees. On appeal, Little Rock contends the district court erred in denying its motion for JAML because the evidence was insufficient to support the substantive due process claims. Little Rock also contends the district court should have granted its new trial motion because the evidence relating to the shoot-out and Jimenez was improperly admitted. Finally, Little Rock contends

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[1] Bullock was not connected to the murder-for-hire scheme but knew Jimenez and lived in the same neighborhood.

the damage awards were unsupported by the evidence, requiring either a new trial or remittitur.

II

Little Rock first contends the district court erred in denying its JAML motion because the evidence was insufficient to prove it violated Hart's and Dyer's substantive due process rights under §1983. We agree.

We review the district court's denial of JAML "in the light most favorable to the party who prevailed before the jury." City of Omaha Employees Betterment Ass'n v. City of Omaha, 883 F.2d 650, 651 (8th Cir. 1989). Accordingly, we

> (1) resolve direct factual conflicts in favor of the nonmovant, (2) assume as true all facts supporting the nonmovant which the evidence tended to prove, (3) give the nonmovant the benefit of all reasonable inferences, and (4) deny the motion if the evidence so viewed would allow reasonable jurors to differ as to the conclusions that could be drawn.

Pumps & Power Co. v. So. States Indus., 787 F.2d 1252, 1258 (8th Cir. 1986) (quotations omitted).

A § 1983 plaintiff must prove the "(1) violation of a constitutional right, (2) committed by a state actor, (3) who acted with the requisite culpability and causation to violate the constitutional right." Kuha v. City of Minnetonka, 365 F.3d 590, 606 (8th

Cir. 2004) (quoting Shrum v. Kluck, 249 F.3d 773, 777 (8th Cir. 2001)). Hart and Dyer allege substantive due process violations, arguing Little Rock's release of their personnel files greatly increased the risk of harm by private individuals who might retaliate against them as police officers.

Generally, states have no affirmative obligation to protect individuals against private violence. DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 197 (1989). The Due Process Clause of the Fourteenth Amendment "is phrased as a limitation on a state's power to act, not as a guarantee of certain minimal levels of safety and security." Id. at 195. "Its purpose [is] to protect the people from the State, not to ensure that the State protect[s] them from each other." Id. at 196. The "State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." Id. at 197.

Substantive due process does, however, require a state to protect individuals under two theories. First, the state owes a duty to protect those in its custody. Gregory v. City of Rogers, 974 F.2d 1006, 1010 (8th Cir. 1992) (en banc). Second, the state owes a duty to protect individuals if it created the danger to which the individuals are subjected. Id. Hart and Dyer rely on the "state-created danger" theory. We assume without deciding that Little Rock's release of Hart's and Dyer's personnel files created sufficient danger to implicate constitutionally protected privacy interests. Additionally, we conclude element two is satisfied because there is no dispute the alleged constitutional

violation was precipitated by state action. Accordingly, our analysis will focus on the third element of their § 1983 claim – whether the evidence proved Little Rock acted with the requisite degree of culpability.

The Due Process Clause's "guarantee does not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm[,]" County of Sacramento v. Lewis, 523 U.S. 833, 848 (1998), and "does not transform every tort committed by a state actor into a constitutional violation," DeShaney, 489 U.S. at 202. "[I]f the state acts affirmatively to place someone in a position of danger that he or she would not otherwise have faced, the state actor, *depending on his or her state of mind*, may have committed a constitutional tort." S.S. v. McMullen, 225 F.3d 960, 962 (8th Cir. 2000) (en banc) (emphasis added). "[T]he test we employ to ascertain a valid substantive due process violation is 'whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.'" Hawkins v. Holloway, 316 F.3d 777, 780 (8th Cir. 2003) (quoting Lewis, 523 U.S. at 848 n.8).

Under the state-created danger theory, Hart and Dyer must prove 1) they were members of a limited, precisely definable group, 2) Little Rock's conduct put them at significant risk of serious, immediate, and proximate harm, 3) the risk was obvious or known to Little Rock, 4) Little Rock acted recklessly in conscious disregard of the risk, and 5) in total, Little Rock's conduct shocks the conscience. Avalos v. City of Glenwood, 382 F.3d 792, 798 (8th

Cir. 2004) (citing Uhlrig v. Harder, 64 F.3d 567, 574 (10th Cir. 1995)).

Mere negligence can never be conscience-shocking and cannot support a claim alleging a violation of substantive due process rights. Terry B. v. Gilkey, 229 F.3d 680, 684 (8th Cir. 2000). Indeed, "[w]e have held more than once that gross negligence 'is not actionable . . . under § 1983.'" S.S., 225 F.3d at 964 (quoting Sellers by and through Sellers v. Baer, 28 F.3d 895, 902-03 (8th Cir. 1994)). "[T]he constitutional concept of conscience shocking duplicates no traditional category of common-law fault, but rather points clearly away from liability, or clearly toward it, only at the ends of the tort law's spectrum of culpability," Lewis, 523 U.S. at 848, and "liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process," Id. at 849. Instead, "[a]ctionable substantive due process claims involve a level of . . . abuse of power so brutal and offensive that [they do] not comport with traditional ideas of fair play and decency." Avalos, 382 F.3d at 800 (quoting S.S., 225 F.3d at 964) (internal quotations omitted); see also Moran v. Clarke, 296 F.3d 638, 647 (8th Cir. 2002) (Substantive due process violations involve conduct "so severe . . . so disproportionate to the need presented, and . . . so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience.") (quoting In re Scott County Master Docket, 672 F. Supp. 1152, 1166 (D. Minn. 1987)). "Proof of intent to harm is usually required, but in some cases, proof of deliberate indifference, an

intermediate level of culpability, will satisfy this substantive due process threshold." Terrell v. Larson, 396 F.3d 975, 978 (8th Cir. 2005) (citing Lewis, 523 U.S. at 848-49) (holding the deliberate indifference standard is applied when actual deliberation is practical)).

In this case, Little Rock acted under circumstances in which actual deliberation was practical. Therefore, its conduct shocks the conscience only if it acted with "deliberate indifference." Id. at 851-52. To define deliberate indifference for Eighth Amendment purposes, the Supreme Court has adopted the subjective standard of criminal recklessness, i.e., "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Farmer v. Brennan, 511 U.S. 825, 837 (1994). In Lewis, the Court equated deliberate indifference for substantive due process with Eighth Amendment deliberate indifference. 523 U.S. at 849-50. Thus, to sustain the district court's denial of JAML, we must conclude there was sufficient evidence to find Little Rock acted intentionally or wrongfully in disregarding a known danger. Avalos, 382 F.3d at 800. Conversely, if we conclude Little Rock's conduct was merely negligent or even grossly negligent, the denial of JAML must be reversed. See Farmer, 511 U.S. at 838 ("[A]n official's failure to alleviate a significant risk that he *should have perceived* but did not, while no cause for commendation, cannot under our cases be condemned . . . .") (emphasis added).

The evidence showed Witherell was aware the personnel files contained sensitive information and the request for the files was related to a criminal proceeding in which Hart and Dyer were likely involved. Additionally, Witherell testified she understood why police officers would not want their personal information released to criminal defendants – as she herself would not want her personal information released to a criminal defendant. Based on this testimony, Hart and Dyer argue she knew there was a substantial risk Bullock might obtain and use the information to harm them or their families and chose to ignore the risk. We disagree. While it is clear Witherell appreciated the sensitive nature of the information, there is no evidence proving she ever considered whether it would be disseminated to Bullock or another criminal defendant. Hart and Dyer make much of Witherell's testimony indicating she would be concerned if her personal information fell into the hands of a known felon. It is, however, not enough for her to testify she understood why police officers would want to protect such information from disclosure to criminal defendants. Instead, Hart and Dyer must prove Witherell actually considered the specific risk at the time she responded to the subpoena. We conclude the evidence was insufficient to support a finding Witherell ever considered, *at the time she processed the request*, whether the information would be disseminated to a criminal defendant who might use it to harm Hart and Dyer.

Hart and Dyer next contend Little Rock was fully aware the information contained in city personnel files is sensitive in nature and the practice

of releasing it to third persons proves deliberate indifference. They argue "the City knew or should have known . . . that providing the . . . personnel files . . . placed [them] . . . at a significant and increased risk of harm." Appellees' Br. at 39. We appreciate how the release of personal information about police officers to criminal defendants could seriously impact their safety. Hart and Dyer, however, were required to prove not only the creation of a significant risk *but also* Little Rock's conscious disregard of the risk. The mere fact Little Rock made it a practice to release such information does not prove it ever considered the specific risks articulated by Hart and Dyer. Assuming, as argued by Hart and Dyer, the City "knew or should have known" its actions exposed them to a significant and increased risk of harm, the evidence only proves the City acted negligently – not with deliberate indifference. Based on this record, we are compelled to conclude the evidence was insufficient to permit the jury to find Little Rock recognized and deliberately disregarded the substantial risk of serious harm alleged by Hart and Dyer. See Beck v. Wilson, 377 F.3d 884, 891 (8th Cir. 2004).

Today's holding comports with our previous applications of the standard plaintiffs must meet to prove a substantive due process violation. In Beck v. Wilson, the plaintiff (Beck) alleged substantive due process violations against several staff members of an alcohol and drug treatment facility after she was sexually assaulted by a male patient. 377 F.3d at 885. Beck had been court ordered to a treatment facility for males and females but at the time of her admission she was the only female patient. On her

first evening there, Beck told staff members she was fearful of male patients who whistled at her and called her "baby girl." Id. at 886. The very next evening, a male patient entered a bathroom while Beck was showering (the bathroom doors could not be locked) and sexually assaulted her. Id. In the days following the attack, the male patient repeatedly threatened to kill Beck and her children if she reported the attack.

The evidence on summary judgment revealed no previous incidents of sexual assault, but staff members were aware of previous incidents of unwelcome sexual behavior. Id. at 887. It also showed patients could not lock their bedroom or the bathroom doors and the facility had no internal surveillance system. Instead, staff members monitored patients from a nurses' station at the end of a hallway and were required to conduct visual verifications on patients every fifteen minutes. Id. at 886. At the time Beck's assault occurred, there was no staff member monitoring patients from the nurses' station and the staff failed to perform the mandated visual verifications. Id. at 890-91. Nevertheless, we reversed the district court's denial of summary judgment, holding the staff members' failure to follow procedure constituted "at most, a negligent omission and a negligent act . . . on which . . . the alleged rapist capitalized to assault Beck." Id. We concluded "[t]he summary judgment facts do not permit a reasonable jury to conclude . . . any male inpatient . . . posed a known threat . . . and, even more clearly, the facts do not permit a jury to infer [the staff] *deliberately decided not to protect Beck*

from a known substantial risk of serious harm." Id. at 891 (emphasis supplied).

In S.S. v. McMullen, we rejected a similar substantive due process claim premised on a state's failure to prevent sexual abuse. 225 F.3d at 962. S.S. alleged the Missouri Division of Family services violated her substantive due process rights when it released her from state custody and returned her to her father, knowing he had previously allowed a known pedophile to have contact with her. S.S. alleged she was released to her father even though the pedophile had personally contacted one of the defendants protesting attempts to limit his contact with her. After S.S. was returned to her father, the pedophile sexually abused her on at least two occasions. Id. On appeal from the district court's grant of summary judgment, we held the state's actions did not shock the conscience. "Even if the state's activities could be said to have been grossly negligent or even reckless in the circumstances present here, we believe that S.S.'s constitutional claim must fail." Id. at 964. "We do not see how we could well hold those acts actionable without violating the Supreme Court's caveat against making 'of the Fourteenth Amendment a font of tort law . . . .'" Id. (quoting Paul v. Davis, 424 U.S. 693, 701 (1976)).

We are troubled by Little Rock's practice of releasing its employees' personnel files – especially those of police officers – without notice or any attempt to redact sensitive personal information. Nevertheless, we conclude the evidence shows Little Rock's actions constitute at most negligence or gross

negligence and do not rise to the level of subjective deliberate indifference necessary to sustain a substantive due process claim.

Despite their failure to prove deliberate indifference, Hart and Dyer argue the district court's denial of JAML should be affirmed based on the Sixth Circuit's holding in Kallstrom v. City of Columbus, 136 F.3d 1055 (6th Cir. 1998). In Kallstrom, three undercover police officers sued the City of Columbus because it released their personnel files to the attorney representing members of a violent gang. During the defendants' criminal trials, it became apparent the information contained in the files had been disseminated to them. Id. at 1059. The officers brought suit, and on appeal from a grant of summary judgment the Kallstrom court held the city's practice of releasing undercover police officers' personnel files under such circumstances created a "constitutionally cognizable 'special danger,' giving rise to liability under § 1983." Id. at 1067. According to Hart and Dyer, their case is factually indistinguishable from Kallstrom, and the district court was correct when it denied JAML on the basis of Kallstrom. See Addendum at A-16 (District Court Order dated February 25, 2004 denying JAML). We disagree. The Kallstrom court based its holding on a finding "[t]he City either knew or clearly should have known" releasing the officers' personal information substantially increased their "vulnerability to private acts of vengeance." Id. In so holding, the Kallstrom court erroneously applied a negligence standard instead of the subjective deliberate indifference standard adopted in Farmer. 511 U.S. at 837. The district court's reliance on

Kallstrom indicates it too improperly adopted a negligence standard, making the denial of Little Rock's motion for JAML erroneous.

III

For these reasons, we conclude the district court erred in denying Little Rock's motion for JAML. Accordingly, we reverse and remand for further proceedings consistent with this opinion. Because we reverse the district court's denial of JAML we do not reach the other issues raised by Little Rock in its appeal.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

[ENTERED: MARCH 23, 2006]

JERRY HART; ANDRE DYER

PLAINTIFFS

VS. **NO. 4:02CV00576**

CITY OF LITTLE ROCK

DEFENDANT

ORDER

In accordance with the Mandate of the Eighth Circuit Court of Appeals, the Court hereby grants Defendant's motion for judgment as a matter of law. Judgment in favor of the Defendant will be entered accordingly.

IT IS SO ORDERED this 23rd day of March, 2006.

/s/ James M. Moody
James M. Moody
United States District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

[ENTERED: MARCH 23, 2006]

JERRY HART; ANDRE DYER

PLAINTIFFS

VS. **NO. 4:02CV00576**

CITY OF LITTLE ROCK

DEFENDANT

JUDGMENT

Pursuant to the Order entered on this date, Judgment is hereby entered in favor of Defendant. All previous judgments are hereby set aside. Plaintiffs' complaint is dismissed with prejudice.

IT IS SO ORDERED this 23rd day of March, 2006.

/s/James M. Moody
James M. Moody
United States District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

FILED FEB 25 2004
[ENTERED: FEBRUARY 25, 2004]

JERRY HART and ANDRE DYER

PLAINTIFFS

V. **4:02CV00576JMM**

CITY OF LITTLE ROCK

DEFENDANT

AMENDED AND SUBSTITUTED ORDER

Pending is the Defendant's Motion for Judgment as a Matter of Law made at trial and the Plaintiffs' Motion for Permanent Injunction and to Seal the Record (Docket # 45). The parties have responded to the motions. For the reasons set forth below, the Motion for Judgment as a Matter of Law is denied. The Motion for Permanent Injunction is denied and the Motion to Seal the Record is granted.

Facts of the Case

Plaintiffs are police officers employed by the Little Rock Police Department. During the time relevant to this lawsuit, Plaintiffs were assigned to patrol one of the more dangerous areas of the City. On multiple occasions, Plaintiffs arrested a resident

of this area by the name of Michael Bullock. Plaintiffs contend that Mr. Bullock held a grudge against them because he was convicted and incarcerated as a result of one of these arrests. As evidence of this fact, Plaintiffs point out that Mr. Bullock had filed complaints against them with the Internal Affairs unit of the police department. (Exhibit D at 47:1-6 to Plaintiffs Motion for Summ. Judg.) Plaintiffs further contend that a neighbor and associate of Mr. Bullock's had placed a contract on their lives. (Exhibit E at 65:8-11 to Plaintiffs Motion for Summ. Judg.).

In the course of Mr. Bullock's criminal proceedings, his attorney subpoenaed the personnel records of Plaintiffs Jerry Hart and Andre Dyer. After receiving the subpoena, Stacey Witherell, an employee of the City of Little Rock's Human Resources Department, immediately provided these documents to Mr. Bullock's attorney. Ms. Witherell testified that the subpoena merely required that the documents be provided at Mr. Bullock's trial. Without regard to these directions, Witherell called Bullock's attorney and offered to deliver the documents to her on the day Witherell received the subpoena. Plaintiffs' personnel records, including addresses, social security numbers and family names, were subsequently provided to Mr. Bullock while he was incarcerated at the Pulaski County Detention Facility. Ms. Witherell did not redact any personal information from these documents before producing them to Mr. Bullock's attorney.

On August 27, 2002, Plaintiffs filed suit in Pulaski County Circuit Court against the City pursuant to § 1983 for invasion of their right to privacy as provided by the Fourteenth Amendment to the United States Constitution. The City removed the case to federal court less than one month later and subsequently filed a motion for summary judgment. Relying on the Sixth Circuit's opinion in *Kallstrom* v. *City of Columbus* and the Eighth Circuit's acknowledgment of the state created danger theory of liability, the Court denied the City's motion for summary judgment. *Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir. 1998); *S.S.* v. *McMullen*, 225 F.3d 960 (8th Cir. 2000)(state created danger); *Davis* v. *Fulton County, AR*, 90 F.3d 1346 (8th Cir. 1996)(state created danger).

At trial, the jury found for the Plaintiffs and awarded them $225,000 each in damages. The City timely moved for judgment as a matter of law pursuant to Rule 50(a). The Court took the motion under advisement and allowed the parties additional time after the trial to file briefs in support of their respective positions.

Judgment as a Matter of Law

When ruling on a motion for judgment as a matter of law, the Court must (1) consider the evidence in the light most favorable to the prevailing party, (2) assume that all conflicts in the evidence were resolved in favor of the prevailing party, (3) assume as proved all facts that the prevailing party's evidence tended to prove, and (4) give the prevailing party the benefit of all favorable inferences that may

reasonably be drawn from the facts proved. That done, the Court must then deny the motion if reasonable persons could differ as to the conclusions to be drawn from the evidence. *E.E.O.C. v. Kohler Co.*, 335 F.3d 766, 772 (8th Cir. 2003)(quoting *Haynes* v. *Bee-line Trucking Co.*, 80 F.3d 1235, 1238 (8th Cir. 1996) (citations omitted)).

> [T]he law places a high standard on overturning a jury verdict because of the danger that the jury's rightful province will be invaded when judgment as a matter of law is misused. Where conflicting inferences reasonably can be drawn from the evidence, it is the role of the jury, not the court, to determine which inference shall be drawn. . . . Thus, it is improper to overturn a jury verdict unless, after giving the nonmoving party the benefit of all reasonable inferences and resolving all conflicts in the evidence in the nonmoving party's favor, there still exists a complete absence of probative facts to support the conclusion reached so that no reasonable juror could have found for the nonmoving party.

Andreas v. Volkswagen of America, Inc., 336 F.3d 789, 795 (8th Cir. 2003)(citations omitted).

In support of its motion, the City argues that the evidence presented at trial does not support a verdict on the Plaintiffs' claim of constitutional invasion of privacy and state created danger. The City contends that the Plaintiffs' evidence was lacking with regard to the following issues: 1)

whether the City, or Ms. Witherell, possessed the requisite intent when the Plaintiffs' personnel records were produced; 2) whether the Plaintiffs' personnel records contained private information not known to the public; and 3) whether the release of these records created a substantial risk of bodily harm from a perceived likely threat.

A. Intent

"Negligent, or even grossly negligent, conduct by government officials cannot be the basis of a constitutional tort claim. A lack of due care by an official causing unintended injury to life, liberty or property does not implicate the due process clause." *Davis v. Fulton County, Arkansas*, 90 F.3d 1346, 1352-53 (8th Cir. 1996)

> [C]ourts applying both the "special relationship" exception to the *DeShaney* rule and the "state-created danger" exception to the *DeShaney* rule have generally required plaintiffs to demonstrate (or, at the motion-to-dismiss stage, to allege) that the defendant state official *at a minimum* acted with deliberate indifference toward the plaintiff. *See, e.g., Butera* v. *District of Columbia*, 235 F.3d 637, 652 (D.C.Cir.2001) (state-created danger); *Nicini v. Morra*, 212 F.3d 798, 810 (3d Cir.2000) (special relationship); *Huffman* \. *County of Los Angeles*, 147 F.3d 1054, 1059 (9th Cir.1998) (state-created danger).

McClendon v. City of Columbia, 305 F.3d 314, 326 (5th Cir. 2002).

In order to prove deliberate indifference, a plaintiff must prove that the state actor knew of and disregarded an excessive risk to the victim's health or safety. *See Ewolski* v. *City of Brunswick*, 287 F.3d 492, 513 (6th Cir. 2002) (quoting *Farmer* v. *Brennan*, 511 U.S. 825, 837, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994)) (internal quotations omitted). The state actor's actual knowledge is critical to the inquiry. "Whether conduct constitutes deliberate indifference is a subjective, rather than an objective, determination." *Farmer*, 511 U.S. at 837, 114 S.Ct. 1970. Thus, "it remains open to the officials to prove that they were unaware of even of an obvious risk to ... health or safety. That a trier of fact may infer knowledge from the obvious, in other words, does not mean that it must do so." *Hott v. Hennepin County, Minnesota*, 260 F.3d 901, 907 (8th Cir. 2001).

Deliberate indifference has been equated with subjective recklessness, and requires the § 1983 plaintiff to show that the state 'official knows of and disregards an excessive risk to [the victim's] health or safety.'" *Ewolski*, 287 F.3d at 513 (footnote omitted). Pursuant to this definition, "the official must be both aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer*, 511 U.S. at 837. Once the state actor draws the necessary inference, "the official must act or fail to act in a manner demonstrating recklessness or callous indifference toward the individual's rights." *Ewolski*, 287 F.3d at 513.

In order to be actionable in this case, the City must have known or clearly should have known that

providing Plaintiffs' personnel information (without review or redacting) to a criminal defense attorney specifically endangered Plaintiffs or their families. *See Kallstrom v. City of Columbus*, 136 F.3d 1055, 1066 (6th Cir. 1998).

Ms. Witherell testified at trial that the files which she provided to Bullock's attorney contained very sensitive data such as officers addresses, family member names and other highly personal information. She stated that she would be concerned if her family members' names and addresses were acquired by a known felon. From her testimony it was clear that she does not consider the employee's position or their safety, as a rule, when producing documents pursuant to subpoenas and she did not consider Plaintiffs safety in this instance. She testified, however, that she was aware at the time of production that the employees whose records were being requested were police officers, that the records were being requested by a criminal defense attorney for use in a criminal case, and that likely these officers had something to do with that case. She testified that she was following City policy by turning over Plaintiffs' personnel records. Ms. Witherell testified that the City's policy concerning production of personnel records was no different for police officers than any other city employee even though she agreed that police officers have a greater privacy interest to protect than most government employees. She further stated that although the subpoena requested that the records be produced at trial, it is the City's custom to provide the records prior to trial if an attorney requests them early.

> The jury was instructed as follows:
>
> Plaintiffs must also demonstrate that through its deliberate conduct the City of Little Rock was the moving force behind the injuries alleged by the Plaintiffs Jerry Hart and Andre Dyer. A merely negligent or even grossly negligent action is not sufficient to prove a constitutional violation.

Jury Instruction No. 8. The City did not object to this instruction. Applying this instruction to Ms. Witherell's testimony and all of the other testimony at trial, the jury found that the City was deliberately indifferent to the Plaintiffs right to privacy. The fact that the City has *a policy* to disregard the consequences of releasing its police officers' personnel information and the fact that the City has a custom of disregarding the directive of the subpoena presents sufficient evidence for the jury to make a finding of deliberate indifference.

This Court has made clear, and it was made abundantly clear at trial, that the fact that these plaintiffs are police officers is determinative. Had the Plaintiffs been employed by the City in another context, the jury (or the Court) may not have found the Plaintiffs' constitutional claims to be actionable. However, the Court notes that the size of the jury's award for the Plaintiffs sends the distinct message that the City's action in this case under these circumstances was "conscience shocking."

B. Private Information

The City argues that the Plaintiffs did not have a privacy interest in the information included in their personnel records because the information was already part of the public record. The Court disagrees.

The jury was told that in order to find for the Plaintiffs the Plaintiffs must prove that "before the disclosure by the City of Little Rock, one or more of the personal facts disclosed by the City was indeed private, that is, not known to the public. . . ." Jury Instructions Number 6 and 7. The jury found that the Plaintiffs had proven each element of their case.

The record reflects that the personnel records provided to Bullock's attorney included Officer Dyer's social security number, driver's license number, his grandmother's name, his mother's name, his sister's name, and his emergency contact information. Officer Hart's personnel files included his social security number, driver's license number, the address from which he was forced to move and the former address of his ex-wife where his daughter currently resides. There was a considerable amount of testimony at trial about the sensitive, personal nature of the information provided to Mr. Bullock's attorney.

The City has also argued that because some of the Plaintiffs' personal information could have been acquired pursuant to the Arkansas Freedom of Information Act, the information is not private as a matter of law. However, in *Stilley v. McBride*, the

Arkansas Supreme Court upheld a lower court's ruling that two Fort Smith police officers' home addresses were exempt from disclosure under the Arkansas Freedom of Information Act § 25-19-105(b)(10) because the information was a clearly unwarranted invasion of personal privacy. *Stilley v. McBride* 965 S.W.2d 125 (Ark. 1998). Moreover, Ms. Witherell testified that had these personnel records been requested pursuant to the Arkansas Freedom of Information Act the Plaintiffs would have been notified prior to release of the information and the Plaintiffs' personal information would have been redacted.

C. Risk/Damages

The City contends that the release of Plaintiffs' records did not create a substantial risk of bodily harm from a perceived - likely threat. It contends that because Plaintiffs did not experience financial disaster or overt threats from Mr. Bullock, Plaintiffs' evidence is insufficient as a matter of law to prove this constitutional claim.

At trial, Plaintiff Hart testified that he felt financial and emotional repercussions from the release of his personal information to Mr. Bullock. Plaintiff Hart testified that because his home address was correct at the time it was provided to Bullock, he felt compelled to move to another residence in order to protect his family. He stated he missed multiple days of work and lost a considerable amount of weight because of his increased anxiety over his family's safety. He testified that he was fearful for the safety of his girlfriend and her

daughter who were living with him at the time of this incident. For a period of time after the release of information, Plaintiff Hart was unable to continue his normal visitation schedule with his teenage daughter. He stated that he did not want his daughter to visit his residence because of the increased risk to her safety. He stated that this incident has adversely affected his morale at work and his ability to relax and feel secure in his off-duty hours.

Plaintiff Dyer testified that he also felt the financial and emotional effects of the release of his information. He stated that he bought an additional gun, a guard dog, and replaced certain doors in his home with doors providing more security. He stated that he felt paranoid, had trouble sleeping, and on one occasion felt as if he and his wife were in danger while walking their dog. He also stated that he felt as though his relationships with family members had suffered as a result of his increased fear for their safety.

Further, there was evidence that Mr. Bullock was a "bully" and generally considered a violent person. He had been known to associate with Shawn Jimenez. Jimenz had been found guilty of two counts of solicitation of capital murder after soliciting an undercover police officer and confidential informant to have these Plaintiffs killed. There was evidence presented at trial that Mr. Bullock acknowledged he could use the Plaintiffs' personal information to their detriment. Further, the jury was given the opportunity to see Mr. Bullock and make their own personal assessment of his character.

From this testimony and all of the evidence presented at trial, the jury found that the Plaintiffs were subjected to a substantial risk of serious bodily harm from a perceived likely threat. The Court finds that there is sufficient evidence in the record to support this finding.

Motion to Seal the Record

In their motion, Plaintiffs ask the Court to seal the record in this case because it contains their personnel information. Further, Plaintiffs ask the Court to enter a permanent injunction prohibiting the Defendant from disseminating police officers' personnel files.

With certain provisions, the Defendant has no objection to the record being sealed in this case. Therefore, the Court hereby grants the Plaintiffs' Motion to Seal the Record. This Order specifically extends to the personnel records of Ms. Stacey Witherell and to deposition exhibits.

Motion for Permanent Injunction

The Defendant objects to the Plaintiffs' request for a permanent injunction. The Defendant points out that there is testimony in the record that the City Human Resources Department no longer releases information pursuant to a subpoena without first contacting the City Attorney's office for authorization. The City states that the Arkansas Freedom of Information Act has been amended by the General Assembly to preclude the release of home addresses for any appointed municipal

employee. Further, Defendant argues that an injunction would be overly broad and could be counterproductive to legitimate law enforcement activities.

> A court must consider the following factors in determining whether to issue a permanent injunction: (1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties; (3) whether the movant proves actual success on the merits; and (4) the public interest.

Forest Park II v. Hadley, 336 F.3d 724, 731 (8th Cir. 2003)(citing *Bank One v. Guttau*, 190 F.3d 724, 847 (8th Cir. 2003)). Although factors three and four fall in favor of an injunction, factors one and two weigh more heavily in favor of denying the injunction. Based upon the City's unequivocal statement that it now handles requests for police officers' personnel files with more scrutiny, the Court finds that the threat of irreparable harm to these Plaintiffs, or any other police officer, from the City's production of personal information is virtually non-existent. Based upon this finding, the injury that granting this injunction would inflict on the City and the public in general is greater than the potential harm to the Plaintiffs.

Conclusion

Defendant's Motion for Judgment as a Matter of Law is DENIED. Plaintiffs' Motion to Seal the Record (Docket # 45) is GRANTED. Plaintiffs'

Motion for Permanent Injunction (Docket # 45) is DENIED.

IT IS SO ORDERED this 25 day of February 2004.

/s/ James M. Moody
James M. Moody
United States District Judge

THIS DOCUMENT ENTERED ON DOCKET SHEET IN COMPLIANCE WITH RULE 58 AND/OR 79(a) FRCP
2/26/04 BY /s/ T. Jones

FILE COPY

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UNITED STATES DISTRICT COURT
Eastern District of Arkansas
U.S. Court House
600 West Capitol, Suite 402
Little Rock, Arkansas 72201-3325

February 26, 2004

* * MAILING CERTIFICATE OF CLERK * *

Re: 4:02-cv-00576.

True and correct copies of the attached were mailed by the clerk to the following: press, file, post

William C. Mann III, Esq.
Little Rock City Attorney's Office
500 West Markham Street
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Little Rock, AR 72201-1496

Thomas M. Carpenter, Esq.
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James W. McCormack, Clerk

Date: 2/26/04 BY: T Jones

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

FILED FEB 25 2004
[ENTERED: FEBRUARY 25, 2004]

JERRY HART and ANDRE DYER

PLAINTIFFS

V. **4:02CV00576JMM**

CITY OF LITTLE ROCK

DEFENDANT

JUDGMENT ON JURY VERDICT

This action came on for trial September 10, 2003, before the Court and a jury, the Honorable James M. Moody, United States District Judge presiding.

The issues having been duly tried, and after deliberating thereon, the jury returned a verdict on September 12, 2003, against defendant and in favor of the plaintiff, Andre Dyer in the amount of $225,000.00 and against the defendant and in favor of the plaintiff, Jerry Hart in the amount of $225,000.00.

IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED that the plaintiff, Jerry Hart, have and recover of and from the

defendant, City of Little Rock, the sum of $225,000.00, together with interest from this date until paid at the rate of 1.26% per annum as provided by law, together with costs as the Court may find allowable; and that the plaintiff, Andre Dyer, have and recover of and from the defendant, City of Little Rock, the sum of $225,000.00, together with interest from this date until paid at the rate of 1.26% per annum as provided by law, together with costs as the Court may find allowable.

Dated this 25th day of February, 2004.

/s/ James M. Moody
James M. Moody
United States District Judge

THIS DOCUMENT ENTERED ON DOCKET SHEET IN COMPLIANCE WITH RULE 58 AND/OR 79(a) FRCP ON 2/26/04 BY T JONES

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

[ENTERED: FEBRUARY 9, 2006]

No. 04-2714

Jerry Hart; Andre Dyer,

Appellees,

vs.

City of Little Rock,

Appellant.

Order Denying Petition for
Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

February 9, 2006

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

JERRY HART and
ANDRE DYER,

Plaintiffs,

v. No. 4:02-CV-576 JMM

CITY OF LITTLE ROCK, Little Rock, Arkansas
Wednesday,
Defendant. September 10, 2003
8:45 A.M.

VOLUME 1

TRANSCRIPT OF TRIAL

BEFORE THE HONORABLE JAMES M. MOODY
United States District Judge, and a jury.

APPEARANCES:

For the Plaintiffs: PATRICK R. JAMES, ESQ.
SAMUEL A. PERRONI, ESQ.
Perroni & James
801 West Third Street
Little Rock, Arkansas 72201

For the Defendant: THOMAS M. CARPENTER, ESQ.
E. SHANE SPRINGS, ESQ.
Little Rock City Attorney's Office
500 West Markham Street.
Room 310
Little Rock, Arkansas 72201

Proceedings reported by machine stenography; transcript prepared by computer.

* * * * *

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sat down, and was just talking to me in general about his charges that he was previously held on. And he indicated to me that Mr. Dyer and Mr. Hart had set him up on the charges that he was currently in on at that time. He told me to let him in his room, he had some papers that he wanted me to see. He indicated that he had wrote a letter to Judge Munson. And he went – I let him in the cell. He went in his cell and got the papers, it was a gold envelope, about that thick a stack of papers. So I started going through the papers, and I observed he had personal information on the two officers, Mr. Hart and Mr. Dyer, social security card numbers was visible, driver's license numbers were visible, a copy of their application for Little Rock Police Department; everything was visible. Nothing was blacked out or anything. And he showed me the letter that he had written to Judge Munson.

Well, I didn't go through all the stack of papers because I didn't want him to think that I was

just being too, you know, nosy about the papers and stuff like that.

So once I finished ~~that, he~~ stacked all his papers up and he indicated to me – he made the statement: "Do you know what I can do with this type of information on these officers?" And he stated that he did have a personal vendetta against these two officers.

Q. So then did you go and report the fact that you had seen this information in Mr. Bullock's cell?